IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. ——.

NATIONAL BANK OF MIDDLESBORO AND H. C. WILLIAMS, Successor Assignee, etc., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction, Questions Presented, Statutes Involved, and Statement of the Case see pages 2 to 6 of the Petition.

1. The final decision of the Board of Tax Appeals involving the same parties, the same issue, and the same taxable year is res judicata in subsequent litigation between the parties.

This case involves the taxable year 1937. H. C. Williams, Successor Assignee, etc., filed a fiduciary income tax return for that year disclosing the income of his trust and paying the tax shown to be due of $361.65 (R. 91). Thereafter the Commissioner of Internal Revenue sent a statutory 90 day deficiency letter asserting additional tax at corporation rates to be due from the Louisville Property Co. pursuant to § 52 of the Revenue Act of 1936 (R. 22-26). H. C. Williams, Successor Assignee, etc., filed a petition with the Board of Tax Appeals "in so far as said notice of deficiency is held to assert a deficiency in tax against" him (R. 16). The Board thereafter dismissed the proceeding—

> for lack of jurisdiction in that the deficiency was determined against a corporation and the notice sent to a corporation in the care of an assignee, whereas the petition is filed by a wholly different person * * * (R. 29).

This most certainly was a determination that H. C. Williams, Successor Assignee, etc. (the petitioner) was not the Louisville Property Co. for the purpose of this tax litigation.

The Circuit Court sought to dispose of the issue by stating (R. 121-122):

> The theory of the 1937 case was that the deficiency notice having been mailed to the corporation, the corporation and only the corporation was liable for the tax. *Liability of the assignee under § 52 was neither asserted by the Commissioner nor considered by the Board member who heard the case.* (Italics supplied.)

Such is not the case. Liability under § 52 *was* asserted by the Commissioner (R. 24); was put in issue by paragraphs 4(a), (b), and (c), and 5(e) of the petition (R. 16-17, 19);

and, in view of the statements of counsel recited in the Board's "Order of Dismissal" (R. 28-29), it seems fair to assume that the issue was considered by the Board member.[3] Since the issue was in the case, the Commissioner was privileged to appeal the decision if dissatisfied and, having failed to do so, should not be heard now in a collateral attack on the decision of the Board.

In his petition to the Board, Williams had also assigned error on the part of the Commissioner regarding the amount of depletion allowable, the computation of capital gains and losses, and the allowance of a dividends paid credit (R. 17). Under the ruling of the Board, these issues were never considered.

After the Board's order of dismissal had become final, the United States brought the present action to enforce the surrender of funds on deposit to the credit of "H. C. Williams, Assignee, etc." in the National Bank of Middlesboro (R. 1-3). The Government thus attempted summarily to collect from Williams the 1937 taxes, the correctness of which Williams had sought to litigate before the Board (R. 16-26), if they were his taxes.

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[3] Any doubt about what consideration the Board member gave the matter is dispelled by reference to the record in the companion case of *Louisville Property Co.* v. *Commissioner*, which was decided with the instant proceeding (R. 116) and in which a petition for certiorari has also been filed. The entire oral argument before the Board is printed in that record on pp. 97-107. In that argument counsel for the Commissioner admits that H. C. Williams, Successor Assignee, etc., is "in a different capacity than the person to whom we sent the deficiency letter". (p. 99 of that record.) The Board member put the issue squarely up to counsel for the Commissioner as follows:

> You will either have to admit that the petition is properly filed here by the person that has filed it, or else insist, as you do, that it is not properly filed by the person to whom you mailed the notice, and you insist it is not. * * *
>
> But if you want to say the petitioner is a person against whom you want to assert the deficiency—collect the tax from him—then you will have to withdraw your motion and go to trial (p. 104 of that record).

The United States prevailed in the District Court (R. 101-105) and in the Circuit Court (R. 115-122). Williams is, therefore, in the position of having his money taken to pay taxes which the Board of Tax Appeals held *were not determined against him. Yet Williams went to the Board expressly to test the correctness of the deficiency if he was liable for it* (R. 16-21). It is an anomalous situation, when the law provides a trial tribunal where a person may go to determine his tax liability and when another trial tribunal can at will set aside the final determination of the first. Yet that is the present situation under the instant Circuit Court decision. The Board correctly ruled that if the Government wanted to collect corporate taxes from Williams, it should file an answer and go to trial on the merits in the proceeding before the Board. (See footnote 3 *supra.*)

Prior to the case at bar it was thought that the doctrine of *res judicata* applied to decisions of the Board of Tax Appeals. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, *Helvering* v. *Mitchell*, 303 U. S. 391, *Portage Silica Co.* v. *Commissioner*, 6 Cir., 89 F. 2d 958; Cf. *Pelham Hall Co.* v. *Hassett*, D. C. Mass., ... F. Supp. ...., decided March 23, 1944.

This Court has recently discussed the decisions of the Board of Tax Appeals and held in *Dobson* v. *Commissioner*, 320 U. S. 489, 499, that—

> Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts [than those of the Tax Court]. Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law.

Since the Board determined and the Government admitted that no taxes were determined for 1937 against H. C. Williams, Successor Assignee, etc., should the Government be allowed to circumvent the Board proceeding by a collateral suit? Should the property of H. C. Williams, Successor Assignee, etc., be taken to pay taxes which the Com-

missioner admittedly assessed against a different entity? To do so abolishes the doctrine of *res judicata*, subjects taxpayers to a multiplicity of lawsuits, and destroys the purpose and usefulness of the Board (Tax Court).

2. Petitioner is taxable as a trust under § 161 of the Revenue Act of 1936 and not as a person "operating the property or business" of the corporation within the meaning of § 52 of that Act.

Section 52 provides that—

> *In cases where* receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. (Italics supplied.)

There must be *some* cases in which assignees do not operate the property or business of corporations. Otherwise Congress would not have used the words "in cases where", etc. It appears that the distinction lies between those cases where the corporation retains an interest (even though remote) in the properties and those where it has no further interest, as in the instant case. Surely, an assignee cannot be operating the property or business *of* a corporation when the corporation has *no* interest in the property.

There is also the question of whether the liquidating of assets is comprehended in § 52, or whether that is something separate and apart from "operating the property or business" of a corporation.

In attempting to bridge the hiatus between § 52 and § 161 of the Revenue Act of 1936, the Circuit Courts have not been consistent. In *Commissioner* v. *Merchants National Building Corporation*, 5 Cir., 131 F. 2d 740, the taxpayer received property of a corporation in trust to pay the debts and distribute the balance to the stockholders. The Board of Tax Appeals, 45 B. T. A. 417, and the Circuit Court, *supra*, held that the trust was not taxable as a corporation.

In the instant case, however, the District and Circuit Courts have held that the trust should be taxed as a corporation, when there are no material differences in the facts in the two cases.

The Circuit Court below was also considering the companion case of *Louisville Property Co.* v. *Commissioner* (R. 116), in which the Board had attempted to distinguish the *Merchants National Building Corporation* case on the ground that two steps were involved in that case even though, after the completion of the second step (within four months of the first step and in the same taxable year), the ultimate facts in the two cases were entirely analogous. (47 B. T. A. 23, 31; R. 80 of *Louisville Property Co.* case.)

The interpretation placed on § 52 by the Commissioner of Internal Revenue seems to be that *any* assignee in trust of a corporation, who is liquidating the assets for the benefit of creditors and stockholders, is taxable as a corporation, even though the corporation (as in the instant case) has no interest whatever in the assets or in the outcome. It appears that this Court has never construed the language of the section. Since it is a live question and of great public interest, it is believed that this Court should consider it and set the matter at rest.

CONCLUSION.

It is submitted that the determinations of fact of the Board of Tax Appeals are entitled to the finality on review which is accorded to final decisions of courts in applying the doctrine of *res judicata*.

It is believed, furthermore, that in drawing a line between § 52 and § 161 of the Revenue Act of 1936, liquidating trustees are taxable only under the latter provision.

Respectfully submitted,

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May, 1944.